

copies of all pleadings and other information regarding the claim. Debtors' counsel believes that information responsive to that request was mailed in late June 1994, but the trustee never received the information submitted. In May 1995 the trustee wrote debtors' counsel following up on the previous request to determine the status of the claim and learned that on July 13, 1994, the debtors had filed a personal injury action in the State Court of Chatham County, Georgia, naming one Patsy Seabrian as the defendant. On May 12, 1995, debtors' counsel responded to the trustee's letter inquiry of May 5 and advised him that the case "went to arbitration on Tuesday, May 5, 1995, and a decision settlement was rendered by Judge Cheatham. I received the decision today and am preparing the necessary motions for authority to settle the claim. I will serve them upon you early next week." To that point debtors' counsel had never sought Court approval of her representation of the debtors in the personal injury action and clearly had not kept the trustee informed of the status of the litigation even if certain information was provided in May 1994 as alleged. Furthermore, the trustee was not apprised of any settlement negotiations, trial assignments, or arbitration hearings so as to be in a position to intervene and represent the interests of the estate as he is required to do in order to perform his responsibilities as trustee.

On June 2, 1995, the debtors filed an amendment to their Schedule "C" claiming personal injury proceeds exempt in the amount of \$6,227.50 and also on June 2, 1995, debtors' counsel filed a Motion seeking appointment retroactively as attorney, authorization to settle the claims in the amount of \$15,000.00, authority to pay attorneys'

fees of \$6,400.00, approval of certain costs and medical expenses, and authority to remit \$6,227.50 to the debtors.

On July 24, 1995, the trustee filed this Motion seeking to recover the settlement proceeds and disburse them to creditors rather than paying the sums to the debtors and their counsel. The trustee asserts that because debtors' counsel was not appointed by the Court to pursue the personal injury litigation as required by 11 U.S.C. Sections 327 and 330 and because no court authority was received prior to the closure of the personal injury case, the only remedy is to disallow the Debtors' claim of exemption, to refuse to appoint debtors' counsel retroactively, and to refuse to pay any attorney's fees incurred pursuant to what apparently is a contingent fee contract between debtors' counsel and the debtors. Debtors' counsel argues that all of the actions taken by her in the case were done in good faith although technically not in accordance with the requirements of the Bankruptcy Code and Rules. Additionally, counsel states that there has been no harm to the estate or to creditors and, therefore, requests retroactive authority to handle the personal injury action and authority to settle the case.

CONCLUSIONS OF LAW

All legal and equitable interests of the debtor prior to commencement of the case are property of the estate. § 541(a)(1) Clearly, the debtor personal injury claim which occurred prepetition is property of the estate. However, bankruptcy rule 1009 states that,

"[a] voluntary petition, schedule or statement of affairs may be amended as a matter of course at any time before the case is closed." Although the case had been closed due to administrative error, it is currently open. Absent a showing of bad faith or prejudice to a party in interest, an allowable exemption should be permitted. In re Doan, 672 F.2d 831, 833 (11th Cir. 1982). Additionally, under Fed.R.Bankr.P. 4003(c) the party objecting to the exemptions has the burden of proving that they are inappropriate. Here, the trustee failed to carry its burden.

In order to establish bad faith one must do so by clear and convincing evidence. In re Magallanes, 96 B.R. 253, 255 (9th Cir. BAP 1988). The trustee asserts that the debtor concealed the hiring of an attorney, filing of a personal injury suit, and entering into arbitration. The trustee also asserts that the debtor waited over a year and a half before amending its petition. However, the debtor listed the claim as "pending personal injury case" under schedule B as personal property. Furthermore, the trustee requested information regarding the progress of the pending claim at the 341 creditors' meeting in June of 1994. ("[a]sked for copies of all pending claim info") *See* Trustee's Meeting Report; Exhibit "A". Clearly, the debtor did not attempt to conceal its claim or hiring of an attorney. The debtor only mistakenly failed to list its claim as exempt. For the above mentioned reasons, the debtor's claim of exemption will be allowed. *See also In re Leopold*, 149 B.R. 325 (Bankr.E.D.N.Y. 1993) (claim of exemption allowed where the debtor listed property as "personal property", although request filed three years after initial filing and four months

after settlement).

Regarding the trustee's objection to attorneys' fees, this Court observes that the trustee is the representative under the estate and has the capacity to sue and be sued. 11 U.S.C. § 323. Although this Court recognizes that debtor's counsel did not disburse the proceeds of the settlement, counsel proceeded with the lawsuit through the completion of an "arbitration settlement" without ever applying to this Court for appointment as debtors' attorney or for approval of settlement.

The net effect is that the case has been settled without the approval of the client. The bankruptcy estate, as represented by the trustee, became the real party in interest with respect to the lawsuit the moment the debtors filed their joint Chapter 7 petition. Thus, unless the trustee decides to abandon the lawsuit, it is the trustee's responsibility to prosecute the suit, including the choice of counsel and determining an appropriate settlement value (with approval of this Court).

11 U.S.C. Section 330 is clear. Compensation of counsel is limited to those who are appointed under Section 327. The debtors' personal injury counsel has not been appointed. Although counsel might in all likelihood have been approved by the trustee and this Court, by proceeding without court approval and the trustee's express authorization, counsel acted without authority of the real party in interest.

Counsel is well known to the Court and I have no doubt that counsel's acts were not undertaken in bad faith. They nevertheless were unauthorized at the time she acted, and I will not exercise the discretion to retroactively approve her appointment or her fees. While the trustee does not, in this case, object to the amount of the settlement, the mischief and chaos which could be encouraged by excusing the omissions are obvious. If counsel in other cases are led to believe that it is appropriate to undertake representation in this manner, the day will come when a case is concluded, by trial or settlement when the trustee does believe the amount to be inadequate, either because of the competence of trial counsel which the trustee did not select or because of differing assessments of litigation strategy or the settlement value of the case. In either event, the trustee would face a difficult task of setting aside a settlement or judgment. Congress established a mechanism to avoid such a horrendous prospect, and because it was not followed, I have no alternative but to deny counsel's application for appointment and for approval of fees.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the settlement of \$15,000.00 is approved, the debtors' exemption of \$6,227.50 is approved and that all other proceeds be turned over to the trustee for administration pursuant to 11 U.S.C. Sections 542 and 543.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This _____ day of September, 1995.